IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

APPEAL FROM ORDER NO. 510 OF 1985 .

Gulam Hussein Mainuddin Tungekar ..Appellants.

vs.

Abdul Razak Gulam Hussein Sonde ..Respondents.
since deceased by his legal heirs.

CORAM: V.C.DAGA,J.
DATED: 13-9-2004.

P.C.

. This appeal is directed against the order dated 27.2.1985 passed by the Additional District Judge, Raigad, dismissing application (Ex.17) under Order 22 Rule 9 of the Code of Civil Procedure, seeking to set aside abatement and praying for substitution of the deceased respondent in appeal contending that the cause of action for appeal survives in favour of the legal heirs and representatives of the deceased named in the civil application

The Facts:

2. The present appellant-plaintiff had filed Civil Appeal No. 158 of 1982 in the District Court, Raigad at Alibag to challenge the judgment and decree dated 20th September 1982 in Regular Civil Suit NO. 126 of

1971 passed by the Civil Judge, JD, Panvel. The sole respondent Smt. Safiyabibi Javje Mainuddin Tungekar during the pendency of the suit on 16.3.1983 left for heavenly abode. An application for substitution came to be moved on 7.1.1985 i.e. after 1 1/2 years, with a prayer for setting aside abatement after condoning delay. The explanation for delay offered was that the appellnt was not aware that the legal heirs are required to be brought on record in case of death of the party to the litigation.

3. The learned Judge of the lower appellate Court while rejecting the said application found that no material was placed before him to show that the appellant was prevented by sufficient cause for continuing with appeal as such submissions made by the appellant came to be rejected. vide order dated 27.2.1985. This order is being challenged in this appeal.

The submissions:

4. The learned Counsel appearing for the appellant submitted that the appellant is a person coming from village. He had no knowledge that the heirs and/or legal representatives of the deceased were required to

be brought on record. During the course of oral submissions, learned Counsel tried to explain that it is not unknown that person coming from village background does not have knowledge as to what steps are required to be taken for substitution. He pressed into service judgment of the Apex Court in the case **of Ram Sumiran vs. D.D.C. AIR 1985 SC 606** wherein the Apex Court ruled that prayer for substitution should be considered liberally.

5. Learned Counsel also placed reliance on the judgment of the Apex Court in the case of **Ram Nath Sao alias Nath Sahu & ors. vs. Gobardhan Sao and ors. (2002) 3 SCC 195,** wherein the Apex Court again ruled that Courts should be liberal while considering such application for substitution. It further held that expression "sufficient cause" within the meaning of section 5 of the Limitation Act, 1963 or Order 22 Rule 9 CPC or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will dependent upon facts of that case. There cannot be any straightjacket formula for accepting or rejecting explanation furnished for

the delay caused in taking steps. However, Courts should not proceed with the tendency to find fault with the cause shown and reject the petition by a slipshod order in overjubilation of disposal drive. Acceptance of explanation should be the rule and refusal, an exception, more so when no negligence or inaction or want of bonafides can be imputed to the defaulting party. It further observed that while considering the matter, the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right to such a party to have the decision on merits. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

CONSIDERATION:

6. The main contention on behalf of the appellant is that serious prejudice would be caused, if the order of abatment of appeal is not set aside. The application for setting aside abatement even though made at belated stage, should have been granted. Reliance was placed on judgment of the Apex Court in the case of **Collector, Land Acquision, Anantnag vs. Most.Katiji, AIR 1987 SC 1353** in which Apex Court laid down as to how the Court should approach in deciding the matter when an appeal or an application was made beyond time. In that case, the Supreme Court has diluted the rigour of the examination of the issue by the Courts for deciding cases for condonation of delay and observed: " Ordinarily, a litigant does not stand to benefit by lodging an appeal late." It was further held: "Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice is made to suffer. As against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

7. Considering the law laid down by the Apex Court from time to time. In view of the aforesaid ruling given by the Supreme Court and perusing the facts and circumstances of this case, I find that the trial

Court has committed an error in not condoning the delay. The application for setting aside abatement has to be allowed. The appellant is allowed to substitute name of the deceased respondent with that of her legal heirs.

8. In the result, appeal is restored to file. Matter is remitted back to the lower appellate Court with direction to decide the appeal as expeditiously as possible at any rate, within 3 months from the date of receipt of copy of this order. Appellant undertakes to carry out necessary amendment in the cause of title of the appeal memo. Appeal stands disposed with no order as to costs.